Recreational Use Protocol Public Hearing

Public Hearing
October 23, 2007

Jon Tack: Today is Tuesday, October 23, this is the public hearing in regard to the adoption of proposal 567 IAC 61.3 Subate, as needed, the comments have been made and the parties wishing to speak will now make such renewed or additional comments as they feel appropriate in light of the errors in taping that occurred. The first person that has requested to comment today is Wally Taylor, representing the Sierra Club. Mr. Taylor, what comments would you like to make this time?

Wally Taylor: Thank you. I am Wally Taylor from Cedar Rapids, I'm the legal chair of the Iowa Chapter of the Sierra Club, and I have some many written comments. When I first looked at the proposed protocol, my initial reaction was that there wasn't much there, it was very sketchy, it didn't seem to really to give any guidance to the Department or the Public in knowing how to conduct UAA's or ensuring any justifiable result that could be relied upon. After making that initial evaluation, I went to the Water Quality Standards Handbook adopted by the EPA, the second edition in 1994, and there's an entire chapter in that handbook, chapter 2, that talks about designation of uses. And it goes into detail about how an agency like the DNR should undertake the use attainability analysis. It talks about three primary factors that should be evaluated, those are physical factors, chemical factors and biological factors. The handbook talks about the various criteria that should be used to evaluate and analyze those three factors. Then, the handbook in quite some detail sets out a seven step process for making the evaluations. I don't see anything in the proposed protocol that talks about those three factors, talks about the criteria to evaluate those factors or even begins to carry out the seven step process. It seemed to me also, that the proposed protocol emphasizes the factors set forth in the EPA regulations at 40CFR, 131.10G for downgrading or removal of waters from the primary contact designation. First of all, the EPA handbook is very clear, if the use factors two and five in 131.10G are not to be used as a basis for removing or downgrading waters from Class A Designation. Furthermore, it seemed to me that with the emphasis on the 131.10G Factors in the proposed protocol that the function the DNR has designed this protocol to be is a way to downgrade and remove waters and not to designate and restore waters to their highest and best use. And that's exactly contrary to the intent and spirit of the Clean Water Act. The Clean Water Act says that waters are to be maintained and restored to their original integrity, and this protocol does not do that. We understand that the DNR is under some pressure from the legislature to finish the UAA process by the end of this year, but if you're going to do it right, I think that's more important than doing it quickly, and for the record we want the Department to know that the Sierra Club stands ready to support the DNR before the Legislature in justifying a delay in order to do the job right rather than to simply meet an arbitrary time line. So I think what needs to be done is that this protocol needs to be scrapped, you need to go back and do it right, follow the process procedures and guidelines in the Water Quality Standards Handbook and accept your responsibility to ensure that the waters of Iowa meet the requirements of the Clean Water Act. Thank you.

Jon Tack: Thank you Mr. Taylor. The next person who's requested an opportunity to speak is Steve Veysey from the Hawkeye Fly Fishing Association. Many times, Mr. Veysey has limited in the amount of time he's allowed to speak. Today, in order to rectify that, we're allowing him to speak twice due to the errors in the taping procedure. Steve you can go ahead and proceed.

Steve Veysey: Thank you. I have seven pages of written comments and I did enumerate upon them earlier, I'm not going to go over them in this much detail the second time. I do think that it's important for administrators listening to this tape recording to go to all the public comments and read them very carefully. My intent in going through them in detail the first time was so that administrators could hear the comments. First of all, although from a regulatory standpoint, the purposes of gathering data, and this is a data gathering protocol, the purpose is to answer questions that lead to logical conclusions. There's two aspects that the data gathering protocol

must contain, first the protocol needs to clearly define the type of data, both quantity and quality that are necessary to lead reasonable people to similar conclusions. And second the protocol must clearly define the efforts that must be taken to acquire this essential data. It's also mandatory to test the validity of any data gathering protocol, first by applying it to a subset of situations, fundamental critical test is whether at the end of the day whether reasonable people reach similar conclusions based upon the data gathered using the protocol. And if the protocol fails this test, it should be corrected and modified as necessary. With regard to the recreational use protocol as we all know the Department has been using this basic protocol for two years, gathering data, and is also nominated two hundred and ninety stream segments for recreational use downgrades. It's a current rule making. However, many people, some of them reasonable, have looked at IDNR's decisions and reached different conclusions. This should raise a huge red flag. There are problems with this protocol, we need, let's go to some of the basics. The entire UAA process is based upon the Clean Water Act, and the requirement that wherever possible waters be restored to full fishable and swimmable. Where fishable means all aquatic life and swimmable means all recreation in and on the water. The Act does allow, recognize situations where this fundamental goal cannot be fully attained immediately, and it temporarily allows for lesser goals in the intermittent six factors of 40CRF 131.10G are given. Note that EPA regulations require that streams that have been downgraded from full fishable/swimmable through the UAA process must be reassessed every three years as part of the State's Tri-Annual Review. This is to accommodate new information, regarding existing uses and attainable uses. This proposed protocol does not even mention this requirement. This omission must be corrected. The first part of the protocol documents the Federal Clean Water Act and quotes Federal registered sections and language. However, it does not mention or quote from the National Guidance, contained in EPA's formal document, Water Quality Standards Handbook, Second Edition 1994. This is the guidance document which both states and regional EPA offices must use in evaluating the appropriateness of state WQS, and if IDNR disagrees, please let's discuss that. In 1978, Iowa signed a Memorandum of Understanding with EPA, which cautified the State's responsibilities. Iowa agreed in the MOU to quote, "Utilize national program guidance and policy memoranda for interpretations of the act and its regulations." Regarding the use of factors 40CFR, 131.10, the Water Quality Standards Handbook has this to say and the last iteration I read the whole thing, I'm just going to read a sentence from it, "this precludes states from using 40CFR 131.10G Factor Two, pertaining to low flows, and Factor Five, pertaining to physical factors in general. These factors cannot be used to remove recreational use protections. However, the vast majority of the 290 UAA downgrade recommendations that IDNR has already proposed through rulemaking are based only on Factor Two. Some reference Factor Five. The inherent purpose of the proposed protocol is to provide appropriate data to be used by whatever decision making methodology IDNR have adopted. This is critical. Clearly, there's a discrepancy in the decision making methodology and this needs to be resolved before the data gathering protocol can be constructed and approved. In fact, the lack of a clear and documented decision making methodology either included in the protocol or published elsewhere, is a huge impediment to the development of an acceptable data gathering protocol. As commented, we are left having to guess about the elements of the decision making methodology in order to determine whether the data gathering procedures in this draft protocol are relevant inadequate or not, and this is untenable. We can postulate, at least in part with some of the critical elements of the decision making methodology should be, critical elements. First and foremost, the presumption of quality convened in the Clean Water Act, it is presumed that with a reasonable degree of mitigation and protection, all waters can eventually be raised to the levels of fishable and swimmable. Therefore, the barrier to designating waters at less than fishable/swimmable through the UAA Process is inherently meant to be high, not low. Second, Clean Water Act is very clear that all beneficial uses that have been attained at any time since November, 1975, must always be protected, and those uses may not be removed, even temporarily, through the UAA Process. Uses that have been attained are called Existing Uses. This raises two additional questions, that must be clearly answered before a data gathering protocol can crafted. Question one, in the context of recreational uses, are there aspects of water quality that must be attained before recreational uses can be considered to exist. And the answer is a resounding no. EPA has been clear and consistent in this regard, the occurrence of a recreational use is the proof that the

use has been attained and is therefore an existing use. Does DNR disagree with this interpretation, that issue must be resolved. Another question, what quality and quantity of data is necessary to prove a recreational use is or has occurred? Considering the propensity of people to recreate in whatever waters are available to them, regardless of the condition of the water, the corollary to that question must also be answered. What degree of outreach and historical investigation is necessary to prove that recreational uses have not occurred? No other questions could be more central to the decision making methodology and therefore by extension the data gathering protocol. Yet apparently neither IDNR Staff or the Commission has grappled head on with this issue and reached documented position. Absent that, it is virtually impossible to craft a data gathering protocol that adequately and efficiently provides the input needed by the decision making methodology. And without a clear answer to these questions of data quality and quantity, necessary to prove an existing use or disprove with reasonable certainty the non-occurrence of a use, there will be no consistency, no verifiability and no legal defensibility for IDNR Staff Use Designation Recommendations or the Commissions' decisions. I then talked briefly about data collection and outreach, I won't go into now. And then talked about interviews and outreach, I won't go into now. Defining A1, A2 and A3 activities, and then the conclusion. At the eleventh hour, all the determinate of elements in the previous version of this protocol were removed. IDNR Staff have admitted that this was done so that the protocol would not be considered part of our Water Quality Standards and therefore not subject to review and approval by EPA. However, this is left a huge vacuum. There is no published decision making methodology upon which to base a data gathering protocol. Clearly the cart is before the horse. This Notice of Intended Action should be temporarily suspended until IDNR Staff or Commission can craft a written, determinative document for evaluating data and making decisions. Only then, can the scientific and legally dependable data collection protocol be created, reviewed and approved. And the remarks I would like to add to the written comments are that, we have a unique opportunity here, well perhaps not unique, hopefully not unique, an opportunity for the conservation groups, and the environmental groups to stand side by side with IDNR Staff in support of their UAA recommendations. Stand side by side as these go through the Commission approval, the Administrative Rules Review Commission Evaluation and finally, EPA approval. This I believe is necessary. We have to stand with DNR, however, at this point, we cannot. And we need to seriously take a step back and correct this protocol and clearly define the decision making methodology upon which the data will feed into. Only then, I think can we reach agreement on UAA recommendations.

Jon Tack: For the record, in the initial attempt at this Public Hearing, when the taping was not done. Mr. Veysey did state, restate his written comments, and basically in entirety in the review of this record, should include a full review of the written comments submitted by Hawkeye Fly Fishing Association, and the presumption that those written comments were stated orally at this time. Is there anything further from any of the parties.

Chris Gruenhagen: This is Chris Gruenhagan, on behalf of the Iowa Farm Bureau and just to make two brief comments. One is that perhaps the issues that have been raised may be resolved with the DNR considering what the scope of this document is and as far as its title and it what it encompasses, that it's protocol for data gathering for the consideration of the UAA's. Rather than encompassing the decision making matrix so to speak of the actual UAA that's contained, the UAA's themselves that's going through a separate rule making process. Secondly, I'd like to comment that in the data that's being gathered in the worksheets, we would suggest that there also be inclusion of gathering information about whether the, there is public access or whether it's a privately accessed stream or rive or lake that is being assessed in that process.